Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

EVERETTE O. BAKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEVENTH CIRCUIT'S RELIANCE ON A DE MINIMIS VIOLATION OF THE TRAVEL ACT TO SUPPORT A CONVICTION FOR LAUNDERING ALL THE PROCEEDS OF A PURELY LOCAL PROSTITUTION BUSINESS REPRESENTS AN UNCONSTITUTIONAL FEDERALIZATION OF A STATE CRIME AND IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN JONES V. UNITED STATES

II. WHETHER FORFEITURE OF DEFENDANT'S BUSINESS AND OVER FOUR MILLION DOLLARS AS A RESULT OF LAUNDERING LESS THAN THREE THOUSAND DOLLARS BASED ON A PREPONDERANCE OF THE EVIDENCE STANDARD IS CONTRARY TO THIS COURT'S DECISIONS IN UNITED STATES V. BAJAKAJIAN AND APPRENDI V. NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Everette O. Baker respectfully requests that a Writ of Certiorari issue to review the judgment and opinion entered in this proceeding on September 20, 2000 by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion is reported at *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000). A copy of this opinion appears at Appendix A.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit issued its opinion on September 20, 2000. This Petition for Writ of Certiorari is filed within 90 days of that opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8, clause 3 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18, United States Code, Section 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with the intent to —
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed . . . .

Title 18, United States Code, Section 1956 provides in pertinent part:

> (A)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to . . . a fine . . . or imprisonment for not more than twenty years, or both.

Title 18, United States Code, Section 982(a)(1) provides in pertinent part:

> The court, in imposing sentence on a person convicted of an offense in violation of . . . section 1956, 1957 . . . of this title shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

STATEMENT OF THE CASE

Quite simply, this case is, in essence, a federal prosecution of the state crime of keeping a house of prostitution, a misdemeanor under Illinois law. Although cloaked in the garb of a federal money laundering case, the prosecution herein was clearly directed at closing down defendant's Brooklyn, Illinois massage parlor business. Even the Court of Appeals recognized the state interest involved in the prosecution: "While local officials apparently weren't inclined to interfere with Baker's illegal enterprise, the federal prosecutors had seen enough." App. A at A4. Following a raid on his business and the inevitable grand jury investigation, Mr. Baker was indicted.

The indictment, in addition to a forfeiture count, charged Mr. Baker with fifteen counts of money laundering in violation of 18 U.S.C. 1956[1], six counts of money laundering in violation of 18 U.S.C. 1957[2], and

---

[1] Each of the fifteen counts was based upon a check written from a business account controlled by Mr. Baker during either 1994 or 1995. Most of these checks were for payroll or specific business purposes.

[2] Five of the six counts involved repayment of a construction loan for the Fantasyland Complex which housed a night club and bookstore as well as a massage parlor. These checks were all issued in 1995. The sixth count related to a bond posted by Mr. Baker in 1997 for a friend in connection with an unrelated matter.

one count of conspiracy to launder money in violation of §1956. The conspiracy allegedly commenced in 1989 and ended in 1997. Both section 1956 and section 1957 prohibit financial or monetary transactions with the proceeds of "specified unlawful activity." According to the indictment the specified unlawful activity which served as a predicate for the money laundering charges was a violation of 18 U.S.C. 1952(a)(3). This statute, also known as the Travel Act, prohibits, in the context of this case, the use of interstate facilities with the intent to promote or facilitate a business enterprise involving prostitution offenses in violation of state law and thereafter the performance of any act to facilitate the illegal activity.

Mr. Baker, according to the indictment, used or caused the use of interstate facilities to clear credit card charges incurred by customers for payment of prostitution services. The use of these interstate facilities was, according to the indictment, with the intent of facilitating the carrying on of a business enterprise involved in a conspiracy to keep a place of prostitution in violation of Illinois state law. The indictment identified 15 specific instances in which a credit card was used to purchase prostitution services at defendant's business and interstate facilities were used to process the credit card charges. After each approval prostitution services were provided to the customer. These transactions only occurred over an eight month period in 1993 and early 1994 and totaled $2590. The indictment identified no other specific transaction in interstate commerce nor was Mr. Baker charged with any substantive or conspiracy violations of the Travel Act.

At trial, the government presented evidence that for an eight year period from 1989 through 1996 Mr. Baker

operated one or more massage parlors in the Brooklyn, Illinois area. Customers were charged a fee for a massage and use of a room in which the massage was to be performed. These fees were paid either in cash or by use of a credit card. The funds were kept by the business and deposited into Mr. Baker's business checking account. Mr. Baker also had a merchant account for the purpose of clearing credit card transactions. The women who gave massages often solicited tips in return for performing various sex acts. The tips were paid to the women either in cash (the method preferred by the women) or by way of a credit card. The women kept the proceeds from the actual prostitution services.

Although a great deal of testimony regarding prostitution and the use of credit cards to pay for such services between 1989 and 1995 was introduced at trial, the government only proved the actual use of interstate facilities in connection with acts of prostitution on the fifteen instances over an eight month period totaling $2590 alleged in the indictment. Since credit cards were used by customers on occasion to merely pay for room rental and/or provide a tip in connection with a "straight" massage (one without prostitution services being provided), evidence of the use of credit cards alone did not establish the use of interstate facilities to pay for prostitution services as charged in the indictment.

However, at the conclusion of the trial, the district court, at the request of the government, instructed the jury that the government did not have to prove that an act of prostitution occurred after a credit card transaction was conducted. In other words, the trial court told the jury that the government did not have to prove the allegations in the indictment which established the predicate Travel Act violations for the money launder-

ing charges. Instead, the jury was told that the government need merely prove that a credit card transaction entitled a customer "to spend time with a masseuse and provided the patron with the opportunity to engage in sex acts." In closing arguments, the prosecutor argued, based on these instructions, that use of a credit card for the "opportunity" to engage in sex was sufficient for conviction and that the government did not have to even prove that the patron received sex. The prosecutor then told the jury that defendant was guilty of the money laundering charges if he "spent or withdrew money from the illegal business". In rebuttal argument the prosecutor told the jury that the only issue was "whether Mr. Baker laundered proceeds of prostitution."

Following Mr. Baker's conviction, the district court (after former counsel waived jury trial on the forfeiture count), determined the issue of forfeiture applying a preponderance of evidence standard. In so doing, the district court rejected defendant's contention that forfeiture was limited to the amounts derived from the specific Travel Act violations alleged in the indictment because only the proceeds from the Travel Act violations would constitute "proceeds of the specified unlawful activity" as required by §1956. Instead, the district court held that

> the "specified unlawful activity" which underlies the money laundering charges in this case is the prostitution-related activities in violation of Illinois state law, not merely the credit card transactions which paid for the prostitution services.

United States v. Baker, 82 F.Supp.2d 936, 941 (S.D. Ill. 1999).

Given the view that the proceeds of the state prosecution offenses formed the basis for forfeiture, the trial court found that in addition to Mr. Baker's business, $4.4 million, representing the income from the massage parlors for the period of the conspiracy was subject to forfeiture. The district court also rejected defendant's Eighth Amendment objection by concluding that "although the underlying crime of prostitution is a state offense, the federal money laundering statute is valid and applicable in this case, and forfeiture is proper in this case and does not amount to an excessive fine." 82 F.Supp.2d at 940.

On appeal, the Seventh Circuit sustained defendant's conviction, rejecting Mr. Baker's argument that the instructions given by the trial court and the prosecutor's closing argument in connection therewith impermissibly amended the indictment, resulting in a conviction for federal money laundering predicated solely on state prostitution offenses. The Court of Appeals concluded that the indictment did not make committing an act of prostitution material to the Travel Act violation and thus no constructive amendment of the indictment occurred. According to the Seventh Circuit, Mr. Baker "only need use interstate facilities with the 'intent to carry on' his conspiracy to keep a place of prostitution." App. A at A11. Thus, the court reasoned, the Travel Act violation is predicated "on a customer presenting his card credit card to obtain prostitution services, not on the customer having actually obtained such services". *Id.* In so ruling, the appellate court adopted the reasoning of the district court placing the emphasis in a Travel Act violation on the local prostitution offenses rather than the existence of a significant or substantial relationship between that business and the use of interstate facilities.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RELIANCE ON A DE MINIMIS VIOLATION OF THE TRAVEL ACT TO SUPPORT A CONVICTION FOR LAUNDERING ALL THE PROCEEDS OF A PURELY LOCAL PROSTITUTION BUSINESS REPRESENTS AN UNCONSTITUTIONAL FEDERALIZATION OF A STATE CRIME AND IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN JONES V. UNITED STATES

The constitutional difficulties presented by this case are not unknown to the Seventh Circuit. In a prior federal prosecution of state prostitution offenses, the court of appeals observed,

> This is a classic example of federalization of a traditional state crime, prostitution, in order to obtain enhanced sentences by converting the state crime into money laundering, a federal offense. It demonstrates how an aggressive United States Attorney can use the money laundering statute as a means to take over from state prosecutors the prosecution of long-established state crimes and, in the process, secure more draconian sentences and increase the already overcrowded federal prisons.

United States v. Montague, 29 F.3d 317, 318 (7th Cir. 1994) In *United States v. Griffith*, 85 F.3d 284, 287-288 (7th Cir. 1996), the Seventh Circuit, after favorably quoting the above-referenced language in *Montague*, also observed "One can imagine a scenario where a local prostitution offense might lack a federal dimension."

Similarly, the Seventh Circuit has long recognized that the interstate travel or use component of a violation of the Travel Act "must relate significantly, rather than incidentally or minimally, to the illegal activity." *United States v. Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988). The constitutional underpinnings for the necessity of a significant interstate component has likewise been recognized by the court of appeals below:

> The federal courts must guard against unduly expansive interpretations of the Travel Act that threaten to "alter sensitive federal-state relationships" or "transform relatively minor state offenses into federal felonies."

United States v. McNeal, 77 F.3d 938, 944 (7th Cir. 1996) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Despite criticism of the government for bringing money laundering prosecutions predicated on purely local prostitution offenses and recognition of the concerns expressed by this Court regarding the sensitive federal-state relationships involved in law enforcement, the Seventh Circuit has continued to affirm convictions which offend these very principles. As a consequence, a body of circuit jurisprudence has developed that is not only draconian and in direct conflict with a long line of decisions by this Court, but also usurps specific criminal policy decisions made by the State of Illinois. This case is the most recent example of the expansive view of federal criminal jurisdiction employed by the Seventh Circuit and demonstrates that this Court must intervene to insure conformity with its rulings.

The Constitution, in Article I, §8, delegates to Congress the power "to regulate Commerce with foreign

Nations, and among the several States, and with the Indian Tribes." This Court, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), while generally continuing the expansion of Congress' power under the Commerce Clause, nevertheless warned that the scope of the power of the federal government under the commerce clause

> may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would eventually obliterate the distinction between what is national and what is local and create a completely centralized government.

This concern is particularly significant in the area of enforcement of criminal laws which has been primarily relegated to the individual states. *Screws v. United States*, 325 U.S. 91, 109 (1945) ("Under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope those delegated powers, has created offenses against the United States."); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). As a consequence, when Congress criminalizes conduct already denoted as criminal under state law, it creates a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396, 411- 412 (1973).

In *Rewis v. United States*, 401 U.S. 808 (1971), this Court considered the issue of federal-state relationship and the resulting limitations on federal police power as a consequence thereof specifically in the context of the Travel Act. The issue before the Court was whether the

Travel Act encompassed the operators of a state gambling business whose customers included individuals who traveled interstate for the purpose of betting. Noting first that the limited legislative history of the Travel Act revealed that the Act was directed at organized crime and specifically persons who reside in one state while managing illegal activities located in another state, the Court went on to reflect on what Congress did not say. The Court found significant that Congress did not discuss the issue that an expansive Travel Act would "alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations in which the geographic origin of the customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. at 812. Since these issues were not addressed in the legislative history of §1952, this Court concluded that "Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another state. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of §1952." 401 U.S. at 812. *See also, United States v. Bass*, 404 U.S. 336, 349-350 (1971) ("In the instant case, the broad interpretation urged by the government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial expansion of federal police resources.").

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court significantly limited the scope of federal jurisdiction in law enforcement. In *Lopez*, this Court invalidated the Gun-Free School Zones Act (18 U.S.C. 922(q)) which made it a federal crime to possess a firearm within 1,000 feet of a school. After an extensive histori-

cal review of the jurisprudence describing the extent of Congress' power under the Commerce Clause, the Court rejected the government's position that possession of a firearm in a local school zone in fact affected interstate commerce because of the potential resulting violent crime which would have an adverse impact on the national economy. "[I]f we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564. In *Lopez*, this Court clearly signaled that an expansionist reading of the federal government's power under the commerce clause would not pass constitutional muster:

> To uphold the government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.

514 U.S. at 567.

More recently, this Court, relying on *Lopez*, further restricted the scope of federal police power under the Commerce Clause. In *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000), this Court reversed the Seventh Circuit and set aside defendant's conviction for violating 18 U.S.C. 844(i) in connection with the arson of a private residence. Under §844(i), it is a federal crime to damage or destroy by fire or an explosive any

property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Jones contended that 844(i), when applied to the arson of a private residence, exceeded the authority vested in Congress under the Commerce Clause. 120 S.Ct. at 1908. The government argued that a prosecution for the arson of a private residence was a constitutional application of §844(i) because the private residence was "used" in activities affecting interstate commerce. Specifically, the government contended that sufficient interstate nexus was demonstrated by a mortgage having been obtained from an Oklahoma lender, a casualty insurance policy having been issued from a Wisconsin insurer and the receipt of natural gas from outside the state of Indiana. 120 S.Ct. at 1910. This Court rejected the government's position, observing that, "Were we to adopt the government's expansive interpretation of §844(i), hardly a building in the land would fall outside the statute's domain." 120 S.Ct. at 1911. If the de minimis interstate connections relied upon by the government were sufficient to trigger §844(i), the Court reasoned, the statute's commerce-affecting activity limitation would have no meaning. Relying on the principle that a statute should be construed in such a manner as to avoid grave constitutional questions, this Court concluded:

> Given the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read §844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement". . . . We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the

> federal-state balance" in the prosecution of crimes. . . . To read 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. [citations omitted].

120 S.Ct. 1912.

The decision of the Seventh Circuit in this case simply cannot be squared with this Court's teachings in *Rewis*, *Lopez* and *Jones*. Regardless of whether the interstate nexus for the predicate Travel Act violation underlying defendant's money laundering conviction is viewed from the theory espoused in the indictment (fifteen uses of a credit card to obtain prostitution services totaling $2590 during an eight year period) or that adopted by the district court and the Seventh Circuit (the credit card need not even be used to obtain prostitution services), no substantial relationship between the local offenses and interstate commerce is established. Indeed, under the Seventh Circuit's view, even if no state crime is associated with the use of the credit card, the fact that it was used at a place of business where prostitution occurs creates federal jurisdiction to prosecute the owner of the business.[3] However, if no illegality is involved in the use of the card, how can the income derived therefrom be proceeds of unlawful activity for money laundering purposes? Just as 15 uses of a credit card over eight years to purchase prostitution services is too attenuated to invoke federal jurisdiction so too is a theory of interstate nexus predicated upon the purchase of lawful services with a credit card. The Seventh Circuit's

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[3] The court of appeals did not explain how paying for non-prostitution services facilitates a business based upon prostitution.

interpretation of the Travel Act is so expansive that it federalizes a purely local criminal offense and therefore results in an unconstitutional application of both the Travel Act and the money laundering statutes.

As a consequence of the unconstitutional expansion of these federal criminal statutes, Mr. Baker's sentence, prior to a downward departure predicated on health concerns, was twenty years, the maximum sentence authorized by 18 U.S.C. 1956. This sentence was arrived at by taking into account the amount of money generated by the massage parlor businesses and defendant's role in operating these businesses. The same conduct under Illinois criminal law would have resulted in a misdemeanor conviction or, at the most, a three year maximum prison sentence. In *Jones*, Justice Stevens noted that the fact that the defendant in that case received a federal sentence of 35 years when the maximum penalty under corresponding state law was only 10 years demonstrated how federal intervention in local law enforcement may "effectively displace a policy choice made by the State." *Jones v. United States*, *supra*, 120 S.Ct. at 1912. Here the disparity in sentencing was 20 times greater than the misdemeanor violation of keeping a house of prostitution and almost 7 times greater than the state felony conspiracy maximum of three years. Little question exists that the Seventh Circuit's failure to abide by the decisions of this Court has resulted in the total displacement of a policy decision by the State of Illinois as to the seriousness of defendant's conduct. Such a result cannot pass constitutional muster and must be reversed.

II. FORFEITURE OF DEFENDANT'S BUSINESS AND OVER FOUR MILLION DOLLARS AS A RESULT OF LAUNDERING LESS THAN THREE THOUSAND DOLLARS BASED ON A PREPONDERANCE OF THE EVIDENCE STANDARD IS CONTRARY TO THIS COURT'S DECISIONS IN UNITED STATES V. BAJAKAJIAN AND APPRENDI V. NEW JERSEY

An unconstitutional collateral consequence of the Seventh Circuit's federalization of a state crime is the disproportionate forfeiture of in excess of four million dollars predicated on defendant "laundering" less than three thousand dollars.

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court held that criminal forfeiture pursuant to 18 U.S.C. 982 violates the Excessive Fines Clause of the Eighth Amendment if it is grossly disproportional to the gravity of a defendant's offense. 524 U.S. at 334. The defendant in *Bajakajian* was discovered to have approximately $357,144 in his possession as he waited at the Los Angeles International Airport to board a flight to Italy. Since Mr. Bajakajian had failed to report that he was transporting more than $10,000 out of the United States, he was indicted for a reporting violation under 31 U.S.C. 5322(a) and lying to government agents in violation of 18 U.S.C. 1001. The third count of the indictment sought forfeiture of the seized $357,144 pursuant to 18 U.S.C. 982(a)(1). 524 U.S. at 324-325. After a bench trial, the district court found the entire $357,144 was subject to forfeiture because it was "involved in" the offense. *Id.*

In reversing the forfeiture in *Bajakajian*, this Court determined that the amount of the forfeiture was disproportionate to the gravity of the crime for which defendant was convicted. In so concluding, this Court relied on the following factors: 1) defendant's crime was solely a reporting offense; 2) the money was unrelated to any other unlawful activities; 3) defendant was not a person to whom the statute was primarily directed; 4) defendant's sentence reflected a minimal level of culpability, and; 5) the harm caused by defendant was minimal in that there was no fraud on the government or loss to the public fisc. 524 U.S. at 338-339.

Clearly the type of gross disproportionality envisioned by this Court in *Bajakajian* is present in this case. First, the amount of money laundered from the specified Travel Act violations charged in the indictment and proved at trial was only $2590, but the amount ordered forfeited was $4.4 million. This results in a forfeiture *1500 times greater* than the amount of proceeds from the specified unlawful activity actually laundered. The Seventh Circuit acknowledged that, in the forfeiture context, the proceeds of the specified unlawful activity consisted of only the credit card transactions for prostitution services and that the district court's basis for forfeiture, that the funds were derived from state prostitution offenses, was erroneous. App. A. at A26. Nevertheless, the court of appeals went on to affirm the district court's forfeiture order on the basis that the funds were "involved" in the offense of conspiracy to launder the proceeds of his prostitution business or as funds used to facilitate the conspiracy. App. A at A27. However, this alternative basis for forfeiture, even if permissible, does not change the excessive fines analysis since the Seventh Circuit agreed that the

proceeds of the specified unlawful activity which were laundered consisted of only the $2590. App. A at A26. It is this figure which must be considered in the *Bajakajian* grossly disproportionate analysis.

Although money laundering is the type of crime at which §982 is directed, the criminal conduct in this case was clearly one of the most benign types of money laundering. No organized crime component was present nor was any violence or other criminal conduct alleged or proven. Furthermore, Mr. Baker used the same company in which he was identified as the owner to open both the credit card clearing and business bank accounts. The proceeds were disbursed by means of check. On his personal and corporate tax returns, Mr. Baker identified the business as a massage parlor. Thus, there was no concealment involved and the "laundering" consisted of merely depositing and withdrawing funds from a bank account.

Nor was any fraud on the government or depletion of the public treasury involved. Indeed Mr. Baker's corporate and personal tax returns were used by the government to establish the income from the businesses which in turn was used to determine the amount of forfeiture. At no time was any suggestion made that Mr. Baker did not truly and accurately report all income or pay the required taxes.

Perhaps most significantly, from an excessive fines/proportionality standpoint, the $4.4 million dollars ordered forfeited was, in large measure, no longer in existence. The money consisted of deposits and expenditures made over the course of the eight year conspiracy. Thus, little of the money existed at the time of defendant's conviction and all of defendant's assets are

now subject to forfeiture (including his home, car, clothes, etc.) as substitute assets. Complete destitution, following release from prison in fifteen years (when defendant will be in his mid-seventies), by any standard, is grossly disproportionate to the crime of depositing $2590 of proceeds from a crime that is a misdemeanor under state law in one's checking account.

Even the Court below suggested that the amount of the forfeiture in this case might constitute an excessive fine. App. A. at A30. Nevertheless, the court ducked the issue by mistakenly suggesting that the issue had not been raised. *Id.* In fact, Mr. Baker had raised the Eighth Amendment excessive fines issue in the trial court. The district court, however, summarily rejected this argument by simply stating, "Clearly, although the underlying crime of prostitution is a state offense, the federal money laundering statute is valid and applicable in this case, and forfeiture is proper under §982, and *does not amount to an excessive fine*." 82 F.Supp.2d at 941. [emphasis added]. In his brief, defendant, while not citing *Bajakajian*, argued that the $4.4 million dollar forfeiture was clearly disproportionate since the $2590 constituted only .047% of the amount deposited in the bank accounts during the period in question. Appellant's Brief at 48. Mr. Baker also argued that these "minuscule amounts of laundered funds cannot possibly justify forfeiture of the entire bank account." *Id.* It is indeed disingenuous for the Seventh Circuit to reject the basis for the district court's ruling, justify the conclusion of the district court on alternative grounds and then not even consider the constitutional basis for setting aside the forfeiture rejected in the district court's reasoning and fairly addressed in Mr. Baker's brief.

The order of forfeiture in this case also suffers from a different constitutional defect. In *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 2362-2363 (2000), this Court specifically held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." No reference is made to forfeiture in the penalty provisions for money laundering under either §1956 or §1957. Yet, this Court held in *Libretti v. United States*, 516 U.S. 29, 39 (1995) that criminal forfeiture is punishment imposed on a convicted defendant *in addition* to any other sentence imposed. As a consequence, criminal forfeiture is a penalty for a crime beyond the statutory maximum otherwise imposed upon conviction. Under *Apprendi*, therefore, the facts supporting forfeiture must be presented to a jury and proven beyond a reasonable doubt.

Although Mr. Baker, through trial counsel, waived a jury determination of forfeiture, the district court, in determining whether to order criminal forfeiture in this case, relied on a preponderance of the evidence standard. 82 F.Supp.2d at 940. Although this case was briefed and argued in the Seventh Circuit prior to this Court's decision in *Apprendi*, the applicability of *Apprendi* to this case was brought to the attention of the Court of Appeals after oral argument through a letter citing additional authority. The Seventh Circuit ignored the implications of *Apprendi* in its opinion. Such inattention does not, however, rectify the fatal error in assessing the forfeiture in this case. At a minimum, therefore, the forfeiture order herein must be vacated.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that, upon briefs and argument before this Court, the judgment of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-3840

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EVERETTE O. BAKER, D/B/A BETTYE'S TOUCH ABOVE, D/B/A FANTASYLAND THEATER & ARCADE, D/B/A/ FANTASYLAND NIGHT CLUB, D/B/A FANTASYLAND MASSAGE PARLOR, D/B/A FANTASY MASSAGES, D/B/A FANTASY MASSAGE PARLOR, D/B/A AMERICAN PRINTING & PUBLISHING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97 CR 30079-William D. Stiehl, Judge.

ARGUED MAY 19, 2000-
DECIDED September 20, 2000

Before FLAUM, *Chief Judge,* and MANION and WILLIAMS, *Circuit Judges.*

MANION, *Circuit Judge.* Everette Baker operated massage parlors that were fronts for his prostitution business. In addition to cash, his operation used credit card and automatic teller machine (ATM) transactions.

He used the proceeds from his prostitution business to maintain and expand that business, as well as several other legal "adult businesses." He was convicted of money laundering and conspiracy to commit money laundering and in addition to being sentenced to fifteen years in prison, was ordered to forfeit millions of dollars. We affirm Baker's convictions, sentence, and the forfeiture order.

1. Background

From 1989 to 1997, Baker operated a complex of interrelated sex businesses in Brooklyn, Illinois, including striptease bars, adult bookstores and movie theaters, and x-rated video arcades. The cornerstone of Baker's "Fantasyland" complex, however, was the "massage parlors" that were fronts for prostitution. The businesses were related in that customers who indulged in the legal adult businesses would fulfill their fantasy in another building in the compound where the prostitutes disguised as masseuses held forth. Customers would select a "masseuse" from a line-up and then rent a room by paying a "house charge" up front. After the customer and the "masseuse" went into a room, the customer would select the type of "massage" he wanted. The prostitutes never discussed specifics with the customers; they simply told the customers that the more they were willing to pay, the more "sensual" the massage would be. Customers would pay the prostitutes with "tips." Both the room rentals and "tips" were often paid by credit card or ATM transactions.

Over the years, Baker employed hundreds of prostitutes, so likely everyone in Brooklyn who cared knew what was going on. Indeed, two daughters of the chief of police, and at one time the brother and the cousin of the

mayor, were on Baker's payroll. Around the holidays, Baker provided a sort of "Christmas bonus" - free "massages" to various municipal employees as a show of gratitude for allowing him to operate in Brooklyn without much (if any) interference. And Baker had good reason to be appreciative. His "adult businesses" (both legal and illegal) were extremely lucrative. Baker had gross revenues during this time of about nine million dollars. It was obviously a fairly extensive operation, with various managers helping Baker with the business (e.g., collecting money, reconciling accounts, stocking on-site ATMs).

To disguise his activities, he set up dummy checking accounts and credit card clearinghouse accounts at area banks under the name of American Printing and Publishing Company. He deposited the proceeds from his prostitution and other ventures into these accounts and wrote checks on the accounts to pay his operating expenses, such as utilities and payroll. Baker not only plowed the proceeds from his sex empire back into his businesses to maintain their operation, he reinvested the proceeds by building additional "massage parlors" and other adult businesses in the Fantasyland complex. Between January 1990 and December 1996, the massage parlors accepted credit cards for prostitution services. "In May of 1995, the defendant, keeping up with modern times and for the convenience of his customers, installed an ATM machine in the Fantasyland massage parlor and adjacent topless nightclub." *See United States v. Baker,* 82 F. Supp.2d 936, 939 (S.D. Ill. 1999). In 1996 Baker stopped accepting credit card payments after he learned that other people "in the business" had faced federal prosecution for money laundering.

While local officials apparently weren't inclined to interfere with Baker's illegal enterprise, the federal prosecutors had seen enough. In January 1997, his operation was raided. Baker reacted by transferring ownership of his businesses to his son, but he continued to maintain *de facto* control over the operation. Although prostitution is not a federal offense, money laundering is if the laundering is carried out using the means of interstate commerce. Baker allowed customers to pay for "massages" with credit card and ATM transactions which went across state lines to clearinghouses (the proceeds of which were deposited into dummy accounts). Baker thus used interstate wires to further and facilitate his prostitution business. In late 1997, the United States indicted Baker on fifteen counts of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), six counts of engaging in monetary transactions in criminally-derived property under 18 U.S.C. § 1957, and one count of conspiracy to launder money under 18 U.S.C. § 1956(a)(1)(A)(i) & (h). It also requested a forfeiture of millions of dollars under 18 U.S.C. § 982. *See Baker*, 82 F. Supp.2d at 937.

A jury convicted Baker of all counts except for the forfeiture count (which Baker agreed to have the court resolve on the briefs). The court sentenced Baker to 120 months on the money laundering charges and 180 months on the conspiracy charge (to run concurrently). In determining Baker's sentence, the district court increased his offense level by seven by including as relevant conduct millions of dollars of income from his "massage parlor" business as funds that were involved in his conspiracy to launder money (it did not include money from Baker's legal sex businesses, although it concluded that this money too was *involved* in Baker's

money laundering conspiracy). The district court also increased Baker's offense level by five for leading a criminal enterprise of five or more persons. And it increased his offense level by two for obstruction of justice, which was based on transferring ownership of the businesses to his son.

As to forfeiture, the government sought to recover the "Fantasyland" complex and $7.5 million as proceeds from Baker's conspiracy to launder the monies from his prostitution business. Baker countered that only $2,590 should be subject to forfeiture as the amount of the specific credit card transactions that the indictment had set forth. The district court ordered Baker to forfeit all the monies that had been involved in the federal activities, not just the credit card transactions the government had proved. *See Baker,* 82 F. Supp.2d at 941-42. The court found that Baker's bank accounts were used to facilitate his federal crimes and therefore the millions of dollars that had passed into and out of these accounts were subject to forfeiture. *Id.* at 942-43. After deleting some entries to avoid double-counting, it ordered Baker to forfeit about $4.4 million as well as the real estate where the "Fantasyland" compound was located. *See id.* at 944.

11. Discussion

Baker appeals his conviction, arguing that the indictment was constructively amended by the district court's jury instructions and the government's comments during closing argument. He also appeals his sentence enhancements, arguing that it was improper for the court to include millions of dollars from his prostitution business, to find that he led five or more people in a criminal enterprise, and to find that he obstructed

justice. Finally, he appeals the forfeiture order.

A. The Indictment

Baker contends that his conviction must be overturned because the indictment in this case was constructively amended in violation of the Fifth Amendment. The Fifth Amendment to the Constitution provides in relevant part that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. A constructive amendment of an indictment violates the Fifth Amendment, *United States v. Willoughby*, 27 *F.3d* 263, 266 (7th Cir. 1994), and "'occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented to the grand jury.'" *United States v. Cusimano*, 148 *F.3d* 824, 829 (7th Cir. 1998). Thus, a "constructive amendment occurs where the offense proven at trial was not included within the parameters of the indictment.'" *United States v. Remsza*, 77 F.3d 1039, 1043 (1996). But not every variation from the verbiage of the indictment, either in terms of proof or jury instructions, constitutes a constructive amendment. *See Willough*by, 27 F.3d at 266 (It "is important to note that not all variations in proof that contradict or supplement verbiage in the indictment rise to the level of constructive amendments."); *United States v. Pigee*, 197 F.3d 879, 886 (7th Cir. 1999) ("We believe that the variances in the court's instruction on Count 6 were so minor that they would not generate any risk that Lipscomb would be convicted of a crime not charged."). The proof at trial or jury instructions must go "'beyond the parameters of the indictment in that it establishes offenses different from

or in addition to those charged by the grand jury." *Pigee*, 197 F.3d at 886.

In this case, one of the bases for Baker's convictions, the federal money laundering statute, provides that

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of *specified unlawful activity*
>
> (A)(i) with the intent to promote the carrying on of *specified unlawful activity* . . . *shall* be sentenced to a fine ... or imprisonment for not more than twenty years or both.

18 U.S.C. § 1956(a)(1)(A)(i) (emphasis added). "Specified unlawful activity" is defined in §1956(c)(7) as "any act or activity constituting an offense listed in [18 U.S.C. §] 1961(l)" (which defines the predicate acts for a RICO violation). Section 1961(1)(B), in turn, lists 18 U.S.C. §1952 (the "Travel Act") as an offense. And the Travel Act provides that:

> (a) Whoever travels in interstate commerce or uses the mail or any facility in interstate . . . commerce, with intent to
>
> > (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform

> (A) any act described in paragraph (1) or (3) shall be fined under this title, imprisoned for not more than five years, or both; ....

18 U.S.C. § 1952(a). The Travel Act defines as an "unlawful activity" any crime of prostitution under state law. *Id.* at § 1952(b). Thus, a person launders money if he makes deposits and withdrawals at banks (conducts "financial transactions"), knowing that they contain proceeds from prostitution ("some form of unlawful activity"), in order to promote using credit cards in a prostitution business (a "specified unlawful activity") if the proceeds from prostitution in fact involve monies from credit card transactions in a prostitution business ("specified unlawful activities"). *See* 18 U.S.C. § 1956(a)(1)(A)(i); *United States v. Griffith,* 85 F.3d 284, 287 (7th Cir. 1996); *United States v. Montague,* 29 F.3d 317, 321-22 (7th Cir. 1994).

To establish a Travel Act violation it is not necessary for the government to prove that an act of prostitution under Illinois law followed each credit card transaction. *See United States v. Campione,* 942 F.2d 429, 434 (7th Cir. 1991). Section "1952 refers to state law only to identify the defendant's unlawful activity[;] the federal crime to be proved in § 1952 is use of the interstate facilities in furtherance of the unlawful activity, not the violation of the law; therefore § 1952 does not require that the state crime ever be completed." Id. In short, "[s]ince § 1952 does not incorporate state law as part of the federal offense, violation of the Act does not require proof of a violation of state law." Id.

Baker acknowledges that, in theory, the government need not prove an underlying act of prostitution to make out a violation of the Travel Act. He argues, however,

that the government was required to do so here because the indictment charged him with violating the Travel Act by causing his employees to use credit cards in order to "provide prostitution services," with the implication being that an act of prostitution must result from each credit card transaction. As a result, he argues that the indictment was constructively amended when the district court instructed the jury that it was sufficient if the government proved that a credit card transaction entitled a customer to spend time with a masseuse, thereby affording him the opportunity to engage in sex, and that the government need not prove that each credit card transaction actually resulted in an act of prostitution. Similarly, he complains about the government arguing to the jury that it need only prove that "the use of the interstate facilities was in furtherance of the illegal activity," and that while the government did prove transactions "in which customers actually did receive sex for the use of credit cards," it was not required to do so. In short, according to Baker, because the jury instructions relieved the government of the responsibility of proving that an act of prostitution resulted from each credit card transaction, the instructions and the government's statements during closing argument constructively amended the indictment by allowing him to be convicted of an offense that is broader than or different from that set out in the indictment.

It is true that if an indictment makes a fact or a manner of committing an offense material to that offense, that fact or manner must be proven, not a substantially different one. *See United States v. Johnson*, 152 F.3d 618, 630 (7th Cir. 1998) (where indictment specifically described destructive devices, government was required to provide proof substantially consistent

with that description); *United States v. Leichtnam*, 948 F.2d 370, 374-75,379-81 (7th Cir. 1991). But Baker misreads the indictment. The government did not make committing an act of prostitution material to the Travel Act violation (and hence the money laundering and conspiracy crimes). As a result, the jury instructions-which were taken from *Campione, see* 942 F.2d at 434-did not constructively amend the indictment (nor did the government's statements in accordance with them).

The indictment in this case listed the Travel Act as the predicate offense for the "specified unlawful activity" component for the money laundering counts, and it set forth the Illinois statute criminalizing the keeping of a house of prostitution as the predicate offense for the Travel Act. For all counts, the indictment also stated that the instrument of interstate commerce that Baker used to promote the unlawful activity of prostitution (as required by the Travel Act) was the processing of credit card charges for "prostitution services." Examples of relevant paragraphs of the indictment are as follows:

> 20. Each [financial transaction affecting interstate commerce] in fact involved the proceeds of unlawful activity specified in Title 18, United States Code, Section 1956(c)(7)-that is, activity constituting an offense listed in Title 18, United States Code, Section 1961(1), namely: activity in which defendant **EVERETTE 0. BAKER** caused use of facilities in interstate commerce with intent to carry on the unlawful activity of a business enterprise involved in Conspiracy to Keep a Place of Prostitution, in violation of Chapter 720, Act 5, Illinois Compiled Statutes (formerly Chapter 38, Illinois Revised Stat-

utes), Sections 1117 and 8-2, and in which defendant **EVERETTE 0. BAKER** thereafter caused to be performed acts to carry on said unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3).

21. It was part of the manner and means of accomplishing this specified unlawful activity that d**efendant EVERETTE 0. BAKER** caused his employees to use the wires in interstate commerce to obtain credit approval from a credit card clearing house in St. Louis, Missouri, for each customer who presented his credit card to obtain prostitution services at said defendant's place of business within the Southern District of Illinois. After such approval was obtained, said defendant's employees engaged in prostitution services with such customers.

The provisions of Illinois law to which paragraph 20 of the indictment refers is not the offense of engaging in prostitution but of "Keeping a Place of Prostitution" and "Conspiracy" or, as the indictment states, a "Conspiracy to Keep a Place of Prostitution." *See* 720 ILCS 5/8-2 ("Conspiracy") and 720 ILCS 5/11-17 ("Keeping a Place of Prostitution"). Thus, under paragraph 20, Baker only need use interstate facilities with the "intent to carry on" his conspiracy to *keep a place of* prostitution. *See Campione,* 942 F.2d at 434 ("But the indictments in this case are not limited, as defendants would have us believe, to oral sex or sexual intercourse.... Those paragraphs of the Illinois Revised Statutes [in the indictment] refer respectively to Conspiracy [§ 8-2], Prostitution, Soliciting for a Prostitute, Pandering, Keeping a Place of Prostitution [§ 11-171, and Pimping.").

With respect to paragraph 21, it first states that as part of Baker's conspiracy to keep a place of prostitution he "caused his employees to use the wires in interstate commerce to obtain credit card approval . . . for each customer who presented his credit card to obtain prostitution services at said defendant's place of business. . . ." *This* is the Travel Act violation. *See* id. at 435 (using "the interstate telephone system to secure authorization for the credit card transactions set out in the indictment facilitated the carrying on of keeping a place of prostitution, one of the state offenses listed" in the indictment). And this violation *is not* tied to the actual commission of an act of prostitution. It is clearly predicated on a customer presenting his credit card to obtain prostitution services, not on the customer having actually obtained such services.

The next sentence is a closer question. This part of paragraph 21 states that "[a]fter such approval was obtained, [Baker's] employees engaged in prostitution services with such customers." We think that this sentence merely *identifies* the underlying state offense, as the Travel Act requires. *See Campione,* 942 F.2d at 434. Unlike in *Leichtnam, supra,* this part of the indictment does not make the actual completion or commission of prostitution services material to the offense; there is no "to wit" or similar language. *See also Willoughby,* 27 F.3d at 266 ("'To wit' is an expression of limitation which, as our cases indicate, makes what follows an essential part of the charged offense."). At any rate, Baker concedes that he did not claim below that the indictment was constructively amended, so we review this forfeited issue for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Hughes,* 213 F.3d 323, 328 (7th Cir. 2000).

Under this standard, there must be: 1) an error; 2) that is clear or obvious; and 3) that affects substantial rights. *United States v. Olano,* 507 U.S. 725, 732-35 (1993); *Cusimano,* 148 F.3d at 828. "In an effort to clarify when an error affects substantial rights, the [Supreme] Court said 'in most cases it means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings.'" *Remsza,* 77 F.3d at 1044 (quoting *Olano,* 507 U.S. at 734). In this circuit it is clear that "the constructive amendment 'must constitute a mistake so serious that but for it the defendant probably would have been acquitted in order for us to reverse.'" *Hughes,* 213 F.3d at 329 (quoting *Cusimano,* 148 F.3d at 828); *see also Remsza,* 77 F.3d at 1044. Even then, "we have the power to correct the error but are not required to do so." *Cusimano,* 148 F.3d at 828 (citing *Olano,* 507 U.S. at 735). "We will not reverse unless we find the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.; see also, Remsza,* 77 F.3d at 1044. Here, it is not plain or obvious the "engaged in prostitution services" sentence means that an actual act of prostitution is part of the Travel Act violation in this case-particularly in the context of the preceding sentence and paragraph. Because it is not obvious that the indictment narrowed the charge as Baker contends, the jury instructions and statements in closing argument did not impermissibly broaden the indictment.

But even if it were plain that the indictment narrowed the predicate state offense for the Travel Act violation as Baker urges, we still would not reverse his conviction. Baker does not contend that the government did not prove that acts of prostitution followed the credit card transactions. As a result, we cannot say that "but for

[the constructive amendment] the defendant probably would have been acquitted." *Hughes,* 213 F. 3d at 329. Contrast *Willoughby,* 27 F.3d at 267 ("since no evidence linked the gun to Willoughby's actual distribution of cocaine ... the weapons conviction could only have been based upon a" theory not charged in the indictment). Moreover, given that Baker does not show that he was prejudiced in his defense, we also cannot say that this assumed error seriously affected "the fairness, integrity, or public reputation of judicial proceedings." *Hughes,* 213 F.3d at 329.

Finally, Baker argues that the indictment was constructively amended when the district court allowed the government to argue another theory during closing argument: money laundering was spending or withdrawing funds from the illegal prostitution business, regardless of any connection to interstate commerce. The government points out that the statement Baker zeros in on was from its introductory remarks at closing argument when it was distinguishing the money laundering in this case from "concealment" money laundering (set out in 18 U.S.C. § 1956(a)(1)(B)(i)). Jury instructions are viewed as a whole. *United States v. Thornton,* 197 F.3d 241, 254 (7th Cir. 1999). We have reviewed the court's instructions, and they accurately state the law; indeed, as noted, most of the instructions Baker complains about are from our opinion *in Campione. See also Montague,* 29 F.3d at 322. On the whole, then, the government's remark distinguishing the money laundering in this case from "concealment" money laundering did not constructively amend the indictment. *See Pigee,* 197 F.3d at 886 ("We believe that the variances in the court's instruction on Count 6 were so minor that they would not generate any risk that Lipscomb would

be convicted of a crime not charged.").

B. The Sentence Enhancements

In determining Baker's sentence, the district court's factual findings are reviewed for clear error and its interpretation of the Sentencing Guidelines is reviewed *de novo. United States v. Emerson* 128 F.3d 557, 562 (7th Cir. 1997). A district court's "characterization of a defendant's role in an offense and its determination of the ... money attributable to a defendant are factual determinations" that are reviewed only for clear error. *United States v. House, 110* F.3d 1281, 1283 (7th Cir. 1997). "Under this standard, we will vacate appellants' sentences only if the district court's findings are without foundation in the evidence, such that we are left with the definite and firm conviction that a mistake has been committed." *Id.*

1. Including the proceeds involved in the conspiracy.

The Sentencing Guidelines provide that 23 is the base offense level for someone convicted under 18 U.S.C. § 1956(h) of conspiracy to launder money in violation of 18 U.S.C. §1956(a)(1)(A)(i). *See U.S.S.G. § 2S1.1 (a); House,* 110 F.3d at 1287-88. If the "volume of funds" involved in the money laundering exceeds $100,000, then the base level is enhanced, depending upon the amount. *See* U.S.S.G. § 2S1.1(b)(2). And since the "value of funds" involved in a money laundering offense is a specific offense characteristic, we must look to a defendant's relevant conduct to determine that value. *See United States v.* Sokolow, 91 F.3d 396, 410 (3d Cir. 1996) (citing U.S.S.G. §§ 1B1.3(1) and 2S1.2(b)). The Relevant Conduct section of the Sentencing Guidelines requires courts to consider:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), *all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,* that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1) (emphasis added). The Commentary to § 2S1.1 states that the "amount of money *involved is* included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise." (Emphasis added.)

The district court determined that about $4.4 million was involved in Baker's conspiracy to launder money from his prostitution business, so it increased his base level by seven. *See id.* at §2S1.1(b)(2)(H). The court arrived at this figure by focusing on the amount of income Baker received from his "massage parlor" business from 1990 to 1997; it declined to include monies that Baker received from his related legal businesses, although it concluded that the money from these ventures was also involved in Baker's money laundering conspiracy. Baker argues that it was, excessive to include the income from his prostitution business over eight years because: 1) the government charged in the indictment that the "specified unlawful activity" of his

laundering of his prostitution proceeds was $2,590 in specific credit card transactions; and 2) the conspiracy only lasted for the six months he shared control with his son.

As to Baker's first contention, Baker was not just convicted of money laundering; he was also convicted of conspiring to launder money. For purposes of the conspiracy, the indictment charged fifteen specific instances of credit card usage (the $2,590) to establish some of the overt acts of the conspiracy and to show that interstate wires were in fact used to obtain prostitution services (indeed, the primary purpose of the credit card and ATM system was to facilitate the prostitution business). These specific credit card transactions do not serve to limit the amount of money "involved" in Baker's conspiracy. Baker was in fact convicted of laundering amounts much larger than $2,590 (about $206,000), and he was convicted of conspiring over the years to launder a lot more than that.

Indeed, the amount of funds that are included as part of Baker's "relevant conduct" is not even limited by the funds charged in the money laundering counts themselves. *See Sokolow,* 91 F.3d at 411 ("Funds associated with uncharged instances of money laundering can be added in to determine the offense level under § 2S1.1 if those acts are within the scope of relevant conduct under § 1B1.3(a)(2). Thus, in determining the 'value of funds' under § 2S1.1, the district court is not necessarily limited only to the funds identified with the counts of conviction."). In a conspiracy spanning several years, the value of funds is determined by the amount of money that is "'reasonably foreseeable" to Baker, including monies that were generated (and then laundered) to further or facilitate the conspiracy. *See House, 110* F.3d

at 1284-85 ("Because a sentencing court is required to take into account not only the acts of a defendant charged with conspiracy, but also 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,' these total amounts would be attributable to a defendant found to have reasonably foreseen the scope of the conspiracy.") (quoting U.S.S.G. §1B1.3(a)(1)(B)). Here, the district court did not clearly err in concluding that the millions of dollars from Baker's "massage parlor" business, which over the years he conspired to launder by depositing into and withdrawing from dummy accounts, were reasonably foreseeable to him as furthering and facilitating his conspiracy. These funds "bankrolled" his prostitution business and thereby his money laundering conspiracy, including the conspiracy's receipt and use of credit card and ATM transactions. Cf. *United States v. $448,342.85, 969* F.2d 474, 477 (7th Cir. *1992)* ("Money need not be derived from a crime to be 'involved'; perhaps a particular sum is used as the bankroll facilitating the fraud."). As the head and "mastermind" of the operation, Baker was obviously privy to the funds that were generated and used in the conspiracy. *See U.S.S.G. §1B1.3(a)(B).*

Furthermore, it is not necessary, as Baker contends, for the government to separate out income from *bona fide* massages (whatever those were) from income from sexual services. The "clean" money was also "involved in" the conspiracy in that, as noted, it helped further and facilitate the operation. Cf. *$448,342.85, supra; United States v. Tencer,* 107 F.3d 1120, 1134 (5th Cir. 1997) (because "clean" money that is commingled with "unclean" money facilitates the money laundering operation, the "clean" money is "involved" in the offense and is therefore forfeitable); *United States v. Jackson,* 935

F.2d 832, 840 (7th Cir. 1991) (Section 1956(a)(1)(A)(i) allows "for convictions where the funds involved in the transaction are derived only in part from 'specified unlawful activities.'" We "cannot believe that Congress intended that participants in unlawful activity could prevent their own convictions under the money laundering statute simply by commingling funds derived from both 'specified unlawful activities' and other activities. Indeed, the commingling in this case is itself suggestive of a design to hide the source of ill-gotten gains. . . . "). Nor is it necessary for the government to attempt to separate proceeds from ATM and credit card transactions in the prostitution business from other proceeds. The "other" proceeds from prostitution also helped further and facilitate the operation and thus were part of the money laundering conspiracy. To determine the value of funds, the government need not trace each dollar of income by the means of payment, and it need not trace each dollar to a specific instance of laundering. Cf. id. (To prove money laundering under 18 U.S.C. § 1956(a), "[w]e do not read Congress's use of the word 'involve' as imposing the requirement that the government trace the origin of all funds deposited in a bank account to determine exactly which funds were used for what transaction.").

As to Baker's second contention, the money laundering conspiracy was much longer than the six months that Baker's son had nominal control. It lasted for several years. Baker complains that the government stipulated that his son was a part of the conspiracy only for several months and that during this time the only proven amount of financial transactions was $235,000. But Baker was not part of the stipulation, and the stipulation did not purport to deal with all of Baker's

activities. The government's stipulation as to the involvement of Baker's son in the conspiracy does not preclude it from showing that Baker conspired with *others* for much longer. And the district court did not clearly err in finding that from 1990 to 1997 Baker conspired with at least seven othersupper-level and mid-level managers, supervisors, and lower-level employees-to launder money from his prostitution business (the involvement of whom we shall discuss next).

2. Leading five or more people in a criminal enterprise.

Pursuant to § 3B1.1 of the Guidelines, the district court enhanced Baker's offense level by four for leading or organizing criminal activity involving five or more people. As noted, Baker argues that to the extent there was a conspiracy to launder money, it only involved him and his son; therefore, he contends that he should not have his sentence increased under § 3B1.1. But the "determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), *i.e.*, all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G., Chapter 3, Part B, Introductory Comment; *see also Montague*, 29 F.3d at 324 (The "effect of this commentary change is to foreclose . . . any interpretation of the word 'offense' that restricts it to the count of conviction."). As with determining the specific offense characteristics for Baker's conspiracy conviction, then, the district court was required to consider the Relevant Conduct provision in determining Baker's role in the offense. This meant it had to consider "'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that oc-

curred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1)(B) (emphasis added).

The evidence clearly shows that Baker led and organized at least seven employees. These people processed credit card transactions, kept the books, issued checks, accounted for shift receipts, delivered the receipts to Baker and his son, hired and fired masseuses, made schedules, held meetings, and set policies; all knew that Baker was laundering the proceeds of the prostitution business which ultimately furthered that business, including its receipt and usage of credit card and ATM transactions. The activities of these people were thus integral to the conspiracy. The district court did not clearly err in considering them in evaluating Baker's role in the offense. *See House, 110* F.3d at 1284 (although wires in a money laundering conspiracy were sent and received by several people, the defendant ultimately received the proceeds and was the common connection between the co-conspirators; therefore, he properly received a four-level enhancement as an organizer or leader).

3. Obstruction of justice.

The district court also enhanced Baker's offense level by two for attempting to obstruct justice based on his transfer of the business to his son after it was raided. *See* U.S.S.G. § 3C1.1. Baker argues that his enhancement was improper because the government did not prove that he intended to obstruct justice, nor did it prove that this transfer, in fact, caused it to spend more resources to investigate or prosecute this matter. With respect to Baker's first argument, the district court found that

Baker transferred the property to "divert" the authorities from his enterprise. While Baker argues that "divert" is not the same thing as "obstruct" or "impede," this parsing of the district court's finding is disingenuous: the district court found that Baker transferred this property to "divert" the authorities *in the hope that it would cause them to stop their efforts.* Specifically, it found that Baker "was going to put the business in his son's name, so it will all fall back on him." His intent was "to divert at least the investigative officers and agents and the prosecutors from pursuing this matter any further . . . ." Thus, the court found that he intended to obstruct justice, and this finding is not clearly erroneous.

As to Baker's second argument, he notes that real estate cannot be hidden (unlike chattel), and that he transferred this property by way of a deed which was on the public record. Because the chain of title is clear, he argues, there is no mystery as to ownership of the business. But an *attempt* to conceal evidence that is material to an investigation, such as by transferring assets to another, warrants an enhancement for obstruction of justice. *See U.S.S.G.* § 3C1.1, App. Note 4(d). Evidence is "material" if, when believed, it tends "to influence or affect the issue under determination." *U.S.S.G. § 3*C1.1, App. Note 6. Here, who owned the business was material both to the offenses of conviction (money laundering and conspiracy to launder money), as well as the consequences of the offense as it related to relevant conduct and forfeiture. Thus, even if Baker did not succeed in obstructing justice, the district court properly enhanced his sentence for *attempting* to do *so. See United States v. Yusufu,* 63 F.3d 505, 515 (7th Cir. 1995) ("A defendant's mere attempt to obstruct the

government's case is sufficient .... Moreover, we believe that a finding of attempt is tantamount to a finding of willfulness. Implicit in the meaning of attempt is the will of the actor to accomplish the act attempted."); *see also United States v. Gibbs*, 61 F.3d 536, 539-40 (7th Cir. 1995) (attempting to shield assets from forfeiture in a bogus transaction constitutes obstruction and warrants an increase under § 3C1.1.).

C. Forfeiture

As with the sentencing enhancements, the district court's factual findings regarding forfeiture are reviewed for clear error and its "determination whether the facts adduced at a forfeiture hearing constitute proper forfeiture" is reviewed *de novo*. *See United States v. 1977 Porsche Carrera*, 946 F.2d 30, 33 (5th Cir. 1991). The criminal forfeiture statute, 18 U.S.C. § 982(a), provides in relevant part that:

> The court , in imposing sentence on a person convicted of an offense in violation of section ... 1956,1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, *involved in* such offense, or any property *traceable to* such property.

(Emphasis added.)[1] The district court ordered Baker to forfeit about $ 4.4 million as proceeds that had been involved in his offenses. It arrived at this figure by focusing on the "specified unlawful activity" under the

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[1] By incorporating 21 U.S.C. § 853, *see* 18 U.S.C. § 982(b)(1), the criminal forfeiture statute allows the government to obtain "substitute assets" if it cannot find property "involved in" or "traceable to" the offense for which a defendant was convicted. See 21 U.S.C. § 853p.

money laundering statutes. It held that the "specified unlawful activity" was Baker's prostitution business, and then added up the proceeds over the years from that business. The court also ordered Baker to forfeit the Fantasyland compound on the ground that it was financed with proceeds from the prostitution business. *See Baker,* 82 F. Supp.2d at 941-44. The court ordered the $4.4 million to be "FORFEITED as a personal monetary judgment" and stated "'that this judgment may be enforced as a regular monetary judgment against" Baker. Id. at 944.

Similar to his argument with respect to "relevant conduct," Baker argues that the only money that is forfeitable is the $2,590 that the government proved at trial was used to obtain prostitution services. He contends that the district court erred by defining the "specified unlawful activity" as his prostitution business. According to Baker, the "specified unlawful activity" is the federal crime, not the state crime which is the predicate for the federal crime. We agree with Baker that the district court misanalyzed the "specified unlawful activity," but not to the extent Baker would hope.

As noted, under the federal money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i), it is a crime to conduct a financial transaction with the proceeds of some form of "'unlawful activity" with the intent to promote the carrying on of a "specified unlawful activity" if the proceeds of the transaction in fact involved the proceeds of a "specified unlawful activity." As also noted, a "specified unlawful activity" under § 1956(c)(7)-via 18 U.S.C. § 1961-can be a Travel Act violation (18 U.S.C. § 1952). But to violate the Travel Act, a person must use the facilities of interstate commerce to facilitate, etc. "an unlawful activity" (a state prostitution offense, for ex-

ample). Here, Baker used interstate wires to facilitate a state prostitution offense which is the Travel Act violation. It is the Travel Act violation which is a "specified unlawful activity" under the money laundering statutes, not the state offense which helps identify the Travel Act violation. See Campione, 942 F.2d at 434 (discussed, supra).

To be guilty of money laundering, then, a financial transaction must not only be made up of proceeds of any "unlawful activity" (e.g., prostitution); it must also contain the proceeds of "specified unlawful activity" (e.g., credit card transactions from prostitution) with the intent to promote the carrying on of the "specified unlawful activity." See § 1956(a)(1)(A)(i). The district court thus erred in holding that the "specified unlawful activity" under § 1956 is the "unlawful activity" under the Travel Act-a state crime of prostitution. The chain of analysis that we set out in *Campione* confirms this, as does the fact that § 1956 uses both the terms "unlawful activity" and "specified unlawful activity," indicating that each has a separate meaning.[2]

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[2] The district court based its conclusion on the following passage from *Montague:* "[T]he Missouri prostitution statute forms the basis for a violation of § 1952, which is a type of racketeering activity listed in § 1961, and is a specified unlawful activity designated in the money laundering statute-§1956." *Baker,* 82 F. Supp.2d at 941 (quoting 29 F.3d at 322). Baker notes that this passage from *Montague is* at the end of a long quotation from *Campione,* which discusses the fact that the Travel Act violation is using the means of interstate commerce to facilitate a state crime, not the underlying state crime. Like Baker, then, we read this passage from *Montague* to mean that while a state prostitution statute "forms the basis for a violation" of the Travel Act, it is the "racketeering activity listed in §1961"-the Travel Act violation itself-that is the "specified unlawful activity designated in the money laundering statute."

But while Baker correctly argues that the focus of the forfeiture statute is on property involved in or traceable to the *federal* crime of which he was convicted (not an underlying state offense), he incorrectly asserts that this crime is the Travel Act violation and that the property is limited to the $2,590 in credit card transactions. As noted, the fifteen credit card transactions to which Baker points established that interstate wires were used to obtain prostitution services (the predicate act for the Travel Act violation); that monies from the prostitution business (the "unlawful activity") that were laundered by being deposited and withdrawn from dummy accounts did in fact contain proceeds from credit card transactions for prostitution services (the "specified unlawful activity"); and that there were overt acts to the conspiracy. Just as the amounts of these specific credit card transactions do not limit Baker's "relevant conduct," they do not limit the amount of his property that is forfeitable.

By analogy, in *United States v. Trost,* 152 F.3d 715 (7th Cir. 1998), a defendant was charged with mail fraud and with eight specific acts of money laundering, totaling $23,000. The district court ordered him to forfeit $57,000 the amount of the money laundering and the mail fraud counts. On appeal, Trost, similar to Baker, argued that he only had to forfeit the specific sums set forth in the money laundering counts. Id. at 720. We rejected this argument, noting that the district court had found that Trost's "account was used *to facilitate the* crimes of which Trost was convicted and that significantly more than $23,000 was funneled through the account to conceal or disguise the true nature of his activities." Id. at 721 (emphasis added). "Given those findings," we held that the amount of the

forfeiture order was "well within acceptable parameters. Money does not need to be derived from the crime to be forfeited. It can be forfeited if it is involved in the crime.'" Id.

To arrive at the forfeitable amount here, the district court excluded any income over the years from Baker's legal sex businesses. It then concluded that Baker's income over the years from his "massage parlor" business was forfeitable because all of these funds were involved in Baker's prostitution business. As noted, the district court should not have based its analysis on the prostitution business *per se*. Rather, it should have based its analysis on the fact that these funds were involved in Baker's conspiracy to launder the proceeds of his prostitution business-one of the federal offenses of which he was convicted. *See* 18 U.S.C. § 982(a). In this case, however, this is a distinction without a difference.

Specifically, as with the forfeited funds in *Trost, all of* the funds from Baker's prostitution business over the years-both the proceeds from credit card and ATM transactions and other proceeds-were illegal, and as a result Baker *laundered all of them. All* of these funds were thus "involved in" the money laundering conspiracy, not just the specific credit card transactions the government proved were for prostitution services and not just the specific monies the government proved were laundered. *See Trost,* 152 F.3d at 721. Furthermore, the funds that were not from credit card and ATM transactions facilitated the conspiracy by helping to further the prostitution business, and, more specifically, the use of credit card and ATM transactions in that business. In short, these funds helped "bankroll" the conspiracy. *See $448,342.85,* 969 F.2d at 477 ("Money need not be derived from a crime to be 'involved'; perhaps a particu-

lar sum is used as the bankroll facilitating the fraud.")[3] It would be incorrect, then, to limit the forfeiture to $2,590, as Baker contends:

> Limiting the forfeiture of funds under these circumstances to the proceeds of the initial [illegal] activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of [other] monies to advance or facilitate the scheme.

Tencer, 107 F.3d at 1135; cf. id. at 1134 ("[C]ourts have concluded that the commingling of crime proceeds with 'clean' money makes money laundering less difficult and may even be necessary to the successful completion of the offense. Such untainted funds have been found to be 'involved' for purposes of the forfeiture statute."). While the district court may have misperceived the precise focus of the proper analysis, it made the relevant findings, and its ultimate conclusion was correct. *See, e.g., Baker,* 82 F. Supp.2d at 942 ("'Much like the accounts in *Trost,* here the evidence clearly established that the accounts were used to facilitate the crimes of which the defendant was convicted. By virtue of the defendant's use of these accounts, the total amount traceable to or involved in the conspiracy to commit money laundering is subject to forfeiture."). Therefore,

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[3] In this regard, the Fantasyland compound is clearly forfeitable. Not only did the ATM and credit card transactions occur on the premises; the conspiracy was obviously run from this compound. As the key to Baker's operation, it was obviously "involved in" the conspiracy.

we need not reverse or remand the issue for further findings.[4]

Finally, we note that the district court ordered Baker to "forfeit" $4.4 million. He does not now have anywhere near that amount. This figure includes the income Baker generated over the years, not what he now has. Significantly, Baker does not assert on appeal that the court erred in its order to forfeit a large amount of money that he does not now have. Perhaps that is because the district court did not err by including such non-existent proceeds, cf. *United States v. Ginsburg,* 773 F.2d 798, 799, 801 (7th Cir. 1985) (en banc) ("The government's right to forfeit the profits or proceeds of racketeering activity under section 1963(a)(1) is therefore not limited to whatever is left over or unspent at the time of the conviction, but instead includes the entire amount that was acquired by the defendant in violation of RICO."). Perhaps also the government can satisfy part of the forfeiture award with assets "traceable to" proceeds of Baker's conspiracy, or with substitute assets. *See* 21 U.S.C. § 853p; *United States v. Hendrickson,* 22 F.3d 170, 175 (7th Cir. 1994). At the forfeiture hearing, though, the government noted that whatever assets were recovered would be far short of the forfeiture award.

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[4] Because the district court excluded the proceeds from Baker's other businesses from its forfeiture calculation, and the government does not cross-appeal this exclusion, we need not address whether the district court was required to make this exclusion (at the forfeiture hearing, the court indicated that it did not think it was). We note, however, that even legitimate funds that are commingled with illegitimate funds can be forfeited if the legitimate funds were somehow involved in the offense, such as by helping to conceal the illegal funds. See *Tencer, 107* F.3d at 1134.

The district court also stated that the government could enforce its forfeiture award against Baker as a regular *in personam* judgment. This was proper, too. *See United States v. Candelaria-Silva,* 166 F.3d 19, 42 (1st Cir. 1999) ("A criminal forfeiture order may take several forms First, the government is entitled to an *in personam* judgment against the defendant for the amount of money the defendant obtained as proceeds of the offense."); *accord United States v. Voigt,* 89 F.3d 1050, 1084 (3d Cir. 1996); *United States v. Lester,* 85 F.3d 1409, 1413 (9th Cir. 1996). In effect this places a judgment lien against Baker for the balance of his prison term and beyond. *See Voigt,* 89 F.3d at 1086 n. 21; cf. *United States v.* $814,254.76, 51 F.3d 207, 211 (9th Cir. 1995) ("[T]he substitute assets provision of the criminal forfeiture statute is merely another mechanism for collecting a judgment against the defendant criminal. . . ."). Because Baker does not assign this as an error, we do not reach the question of whether this constitutes an excessive fine or causes some other injury.

111. Conclusion

Because the indictment did not make the commission of acts of prostitution material to the money laundering and conspiracy counts, it is not "plainly obvious" that the indictment was constructively amended when the district court charged the jury that it need not find that an act of prostitution accompanied each credit card transaction that was presented to obtain prostitution services, or when the government made similar statements during closing argument. Furthermore, the district court did not clearly err in including as relevant conduct the proceeds from Baker's prostitution business over the years as monies "involved in" the con-

spiracy because they furthered and facilitated the money laundering conspiracy. The district court also did not clearly err in enhancing Baker's offense level for leading five or more people in the conspiracy and for attempting to obstruct justice by transferring ownership of his businesses to his son. Finally, because the millions of dollars that Baker generated from his prostitution business over the years facilitated his money laundering conspiracy, the district court did not clearly err in including these proceeds in its forfeiture order as monies "involved in" Baker's offense.

For the foregoing reasons, the judgment of the district court is Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit